STATE OF MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED April 26, 2011

Plaintiff-Appellee,

No. 296732

Wayne Circuit Court ALBERT THOMAS ANDERSON, LC No. 09-007971-FH

Defendant-Appellant.

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

v

A jury convicted Albert Anderson of unarmed robbery,¹ and assault with intent to do great bodily harm less than murder.² The trial court sentenced him as a fourth habitual offender,³ to concurrent prison terms of 228 to 720 months for each conviction. We affirm Anderson's convictions, but vacate his sentences and remand for resentencing.

I. FACTS

This case arose out of events that occurred on January 13, 2009. Laura Sims, then 81 years old, lived with her son on Pennsylvania Avenue in Detroit, Michigan. Sims had lived there for more than 40 years. Sims testified that she and Anderson used to live on the same street and that Sims' children and Anderson had often played together as children.

At some point, Sims' son left their home, leaving Sims alone in the house. Sims testified that she was upstairs in her bedroom when she heard knocking on a window and then the doorbell ring. Sims opened her door, revealing Anderson on her porch. She then let him into her home.

² MCL 750.84.

³ MCL 769.12.

¹ MCL 750.530.

Sims testified that Anderson asked if her son was home, but she told him that her son had left to pick up his children. Sims testified that Anderson then stated that he needed some water because he had been working down the street. Anderson went into the kitchen and soon returned to where Sims was seated. Anderson then asked Sims if he could use the bathroom, and Sims gave him her permission. The bathroom was located on the second floor of the home.

Sims stated that Anderson was upstairs for an unusually long amount of time. So, she went upstairs to investigate. Sims found Anderson "standing in the bathroom door with his britches opened." Anderson then asked Sims if she had any money. Sims ignored the question and turned to leave. Anderson followed Sims, grabbed her arms, pulled her toward him, and said, "I asked you do you got any money." He then pushed her into her son's bedroom, knocking her into a dresser, and causing her to fall to the floor.

Sims testified that once she was on the floor, Anderson began kicking and stomping her, and he told her to "go into that closet and get that black pocket book out and some money." Sims stated that she did not have any money, to which Anderson responded, "You better have some money because that is what I want." Anderson continued kicking Sims, and she continued to state that she did not have any money. Eventually, Sims lost consciousness. After the incident, Sims awoke and found that her jewelry box had been moved from a dresser drawer in her bedroom to the bed in her son's room. The jewelry, along with two watches from her son's room, and a video gaming system were all missing.

When Sims awoke, she called her daughter, Alice Parham. Parham testified that her mother called her around 2:45 p.m. and stated that "Albert came to my house, he beat me up and he stole my jewelry." Parham, Sims' son, and other family members went to the house; the police were already there. Parham gave police information about where to locate Anderson. Police went to Anderson's house and arrested him.

Anderson testified that he never went to Sims' house that day and that he had not seen Sims for decades.

William Hart, a Detroit police officer, testified that he responded to Sims' house on January 13. He spoke to Sims, who had "sustained a pretty good beating" and "was in distress." Sims told him that Anderson and another man came to her door.

At a pre-trial conference, Anderson's attorney advised the trial court that Anderson wished to have a jury trial. The trial court asked Anderson's attorney if there was a plea offer, to which Anderson's attorney responded that there was not. The following exchange then occurred:

The Court: Why, because the defendant's already been convicted of [five other offenses?] This 60 year old is facing up to life in prison. And what are the guidelines?

Prosecutor: The guidelines are 58 to 228 with the habitual, your Honor.

The Court: All right. What do you want to do?

Anderson: Sir, you know, since I caught . . . this case from day one from the arresting officer I've been found guilty. I stayed in the hospital two month[s] for a beating. Been in a comma [sic]. You know, I is [sic] something. I have been knowing the complainant all my life since a kid you know. And I've not seen her in 25 years.

The Court: Okay. Well, I don't know what the case is about.

Anderson: This is assault.

The Court: If you want to go to trial then go to trial. You know, you are 60 years old.

Anderson: I don't want my life snatched away.

The Court: You know what the guidelines are. I'm sure you are old enough to evaluate your circumstances. If you want to go to trial we'll set it for trial. If you want to plea[d] you can plea[d]. What is the plea offer?

Anderson's Attorney: No reduce[d] plea, your Honor.

Prosecutor: There is no offer, plead as charge[d] and the defendant can get a guideline sentence but there's no offer.

* * *

The Court: Well if you want to plea[d] I'll give you the bottom of the guidelines. Was there an injury?

Prosecutor: Yes.

The Court: Was it a serious injury?

Prosecutor: Yes she was assaulted and beaten to unconsciousness.

* * *

Anderson: And I've been knowing her since I was a kid, your Honor.

The Court: Okay.

Anderson: And like I say I'm 60 years old I don't hunt old ladies to beat up.

The Court: All right. We'll set it for trial. The clerk can give us a date.

Anderson: Your Honor, can I ask for her to have some kind of medical exam or something[?]

The Court: She was in a comma [sic]. She was beat up. I'm sure she was given medical attention.

* * *

Anderson: I'm speaking about she's up in age. My mother suffered from Alzheimer's when she got that age, you know. If I can have a report with some kind of insanity or because I'm trying I don't want to go to prison for something like this that I don't know nothing about.

The Court: I wouldn't want you to go to prison for something that you didn't do. So that's what the trial is for. We'll go to trial...

Jury selection began, and the venire was "sworn as to qualifications." After a jury was selected, the court provided some preliminary instructions. According to the transcript, jury selection began at 10:20 a.m. and concluded at 11:30 a.m. There is no mention of the jury being sworn. However, a work sheet in the file detailing the trial proceedings contains the following notations:

Jan 05 2010 – 1030 AM Voir Dire Began. 1130 AM Jury Panel sworn by clerk. . . .

Jan 06 2010

Jury heretofore having been duly impaneled and sworn, and having heard all of the testimony and arguments of counsel, hear the charge of the court and retire in charge of an officer, duly sworn to attend them, at 12:20 p.m. and then return at 100 p.m. and say in the presence of the court that they find the defendant guilty of unarmed robbery statute sec. 750.530 guilty of AWIGBH statute sec. 750.84.

II. SWORN JURY

A. STANDARD OF REVIEW

Anderson argues that he is entitled to a new trial because the jury was not sworn before the trial began. The issue is unpreserved for appeal because it was not raised, addressed, and decided in the trial court.⁴ This Court reviews unpreserved issues for plain error affecting substantial rights.⁵

_

⁴ People v Metamora Water Serv Inc, 276 Mich App 376, 382; 741 NW2d 61 (2007).

⁵ People v Carines, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

B. LEGAL STANDARDS

Prospective jurors must be sworn before jury selection begins.⁶ And the jurors selected to hear the case must then be sworn before the trial begins.⁷ The form of the oath the trial court gives to the impaneled jurors is prescribed by statute.⁸ The oath is not a mere formality; it is "designed to protect the fundamental right of trial by an impartial jury." A conviction is invalid if a jury that has not been sworn returns it.¹⁰

The trial transcript shows that the prospective jurors were sworn, but it does not show that the impaneled jurors were sworn. However, a clerk's work sheet in the file that details the trial proceedings states in part "Jan 05 2010 – 1030 AM Voir Dire Began. 1130 AM Jury Panel sworn by clerk" This work sheet, which is part of the record, is sufficient to show that the jury was properly sworn. ¹¹ Because the record indicates that the jury was properly sworn, Anderson cannot show plain error.

III. ANDERSON'S STANDARD 4 BRIEF

A. STANDARD OF REVIEW

Anderson raises additional issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

Anderson raises two claims of ineffective assistance of counsel related to the scoring of the sentencing guidelines. But because Anderson did not raise these ineffective assistance of counsel claims in a motion for a new trial or request for an evidentiary hearing, our review is limited to errors apparent from the existing record.¹²

B. LEGAL STANDARDS

To establish a claim of ineffective assistance of counsel, Anderson must show

⁷ MCR 6.412(F).

⁶ MCR 6.412(B).

⁸ MCL 768.14; MCL 768.15.

⁹ People v Pribble, 72 Mich App 219, 224; 249 NW2d 363 (1976).

¹⁰ *Id.* at 225.

¹¹ *People v Livingston*, 57 Mich App 726, 734; 226 NW2d 704 (1975), remanded on other grounds 396 Mich 818 (1976).

 $^{^{12}}$ People v Rodriguez, 251 Mich App 10, 38; 650 NW2d 96 (2002); People v Snider, 239 Mich App 393, 423; 608 NW2d 502 (2000).

"that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy." [13]

This Court may review an unpreserved issue regarding the trial court's scoring of the guidelines under an ineffective assistance of counsel theory. Anderson must show that had counsel challenged the scoring of the guidelines, the challenge would have been successful and would have affected the guidelines range under which the trial court sentenced him.

C. APPLYING THE LEGAL STANDARDS

The trial court scored 70 points for the total prior record variable (PRV) and 85 points for the total offense variable (OV). These scores placed Anderson in the E-VI cell of the applicable sentencing grid for which the minimum sentence range is 58 to 114 months. For a fourth habitual offender, the upper limit is doubled, which makes Anderson's minimum sentence range 58 to 228 months. Sixty of the 70 PRV points were based on the scoring of PRV 1, MCL 777.51 (prior high severity felony convictions), PRV 2, MCL 777.52 (prior low severity felony convictions), and PRV 5, MCL 777.55 (prior misdemeanor convictions).

The instructions for scoring PRV 1 through PRV 5 state in pertinent part:

- (1) In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.
- (2) Apply subsection (1) by determining the time between the discharge date for the prior conviction or juvenile adjudication most recently preceding the commission date of the sentencing offense. If it is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. . . . [18]

¹³ People v Horn, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted).

¹⁴ People v Harmon, 248 Mich App 522, 530; 640 NW2d 314 (2001).

¹⁵ People v Wilson, 252 Mich App 390, 394, 396-397; 652 NW2d 488 (2002).

¹⁶ MCL 777.64.

¹⁷ MCL 777.21(3)(c).

¹⁸ MCL 777.50.

The relevant consideration under this statute is "whether, starting with the present offense, there was ever a gap of 10 or more years between a discharge date and a subsequent commission date that would cut off the remainder of [the] prior convictions or juvenile adjudications."19

According to the presentence report, Anderson has a history of convictions dating back to 1972. However, the most recent conviction preceding the sentencing offenses was in 1995 and Anderson was discharged from probation on October 30, 1998, which is more than 10 years before the sentencing offenses were committed on January 13, 2009. Because there was a gap of more than ten years between the sentencing offense and the discharge date for the most recent prior conviction, the trial court should not have counted any of Anderson's prior convictions for purposes of PRVs 1 through 5. If Anderson's PRV score is reduced by 60 points, he would be in the C-VI cell, for which the minimum sentence range is 43 to 172 months for a fourth habitual offender.²⁰ Because defense counsel did not object to the scoring of PRVs 1, 2, and 5, the trial court utilized the wrong minimum sentence range and imposed a sentence in excess of that permitted under the applicable guidelines range. Accordingly, defense counsel erred in failing to object to the scoring of the guidelines, and Anderson was prejudiced by counsel's error. Therefore, Anderson is entitled to resentencing.

Anderson also contends his trial counsel's failure to note the scoring error during a pretrial conference caused him to forgo a plea deal. A claim of ineffective assistance of counsel can be made out where a defendant rejects a plea offer because his counsel failed to properly inform him of the consequences of accepting or rejecting the offer, e.g., where a defendant rejects a plea offer because counsel mistakenly advised him that the offer "would not provide him with more advantageous sentencing consequences than he would receive if he were convicted" at trial.²¹

At the pretrial hearing, the parties confirmed that there was no plea offer. After being advised that the guidelines range was 58 to 228 months, the trial court offered to sentence Anderson at the bottom of the guidelines range if he pleaded guilty. There is no indication that the trial court would have extended the same offer had it been aware of the actual guidelines range. The real prejudice is a result of Anderson not accepting a sentence at the bottom of the sentencing range, not from defense counsel's failure to note the error in the sentencing guidelines. Had Anderson accepted the trial court's offer to sentence him at the bottom of the minimum guidelines, his resulting sentence would have been much less. In any event, the record does not support a finding that Anderson would have entered a guilty plea. To the contrary, Anderson stated on the record that he had not seen Sims for 25 years and did not know anything about the alleged offenses and implied that Sims had wrongfully accused him because she was demented or insane. Accordingly, we find this aspect of Anderson's claim to be without merit.

¹⁹ People v Billings, 283 Mich App 538, 552; 770 NW2d 893 (2009).

²⁰ MCL 777.21(3)(c); MCL 777.64

²¹ People v McCauley, 287 Mich App 158, 162-163; 782 NW2d 520 (2010).

Anderson's convictions are affirmed, but his sentences are vacated and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Jane M. Beckering /s/ William C. Whitbeck /s/ Michael J. Kelly